IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.101 OF 2004

The Chief Engineer (S.P.) Irrigation Department, (M.K.V.D.C., Pune) ... Petitioners

v/s

M/s Valecha Engineering Ltd. ... Respondents

Mr Vijay Patil for Petitioners.

Mr K.M. Jawle for Respondents.

CORAM : D.K.DESHMUKH J.

DATE : 27TH JULY 2004

P.C.: -

1. By this petition, the petitioner challenges the award made by the Board of Arbitrators dated 5th October 2001 in relation to claim No.6. The first objection of the petitioner to the claim was that in terms of clause 56 of the terms of contract between the parties, the contractor is required to give notice of his intention to refer the dispute to arbitration within a period of 30 days of the decision given by the Superintending Engineer. Failure of the contractor to give notice of the intention to go to the arbitration results in the decision given by the Superintending Engineer becoming final. According to the petitioner, in the present case, in relation to claim No.6, the respondent contractor had submitted an appeal to the Superintending Engineer dated 5th April 1995. That appeal was against the decision of the Executive Engineer dated 28th March 1995. That appeal was decided by the Superintending Engineer by order dated 28th September 1995 and the appeal and the claim of the contractor was rejected. It is an admitted position that the notice of intention of the contractor to go for arbitration was given on 24th January 1996. According

to the respondents therefore, the Arbitrators had no jurisdiction to make an award in relation this claim because clause 57 of the contract provides that all disputes and differences between the parties in respect of which decision is not final are conclusive as per the contract shall be referred to arbitration and as in terms of clause 56, the decision of the Superintending Engineer has become final, the Arbitrators had no jurisdiction. Perusal of the award of the Board of Arbitrators shows that they have held that bar of clause 56 does not operate in relation to the claim because when earlier claims were referred to the Board of Arbitrators, a claim for the price of the rubble which was required to be brought by the contractor from other quarries was raised, but the Board of Arbitrators did not make any award in relation to that claim because the work was incomplete and therefore, they held that the claim was premature. That award was admittedly made on 21st June 1999. According to the Board of Arbitrators, the same claim was made before the new Board of Arbitrators and therefore, clause 56 does not operate.

2. The learned counsel appearing for petitioner submits that the finding recorded by the Board of Arbitrators suffers from non-application of mind. It is submitted that what was being submitted this time was

not the same claim which was submitted before the earlier Board of Arbitrators which was held to be premature. Presently, a fresh claim was submitted. The Board of Arbitrators have also noted that the quantities have been updated by the contractor while submitting the new claim. Therefore, what was being submitted was a new claim and it is for this reason that the contractor had filed appeal to the Executive Engineer and the Superintending Engineer in terms of the provisions of clause 56 and therefore, the finding recorded by the Board of arbitrators is liable to be set aside. On the other hand, the learned counsel appearing for respondents submits that the finding recorded by the Board of Arbitrators is not liable to be disturbed. According to the learned counsel, the claim was crystalised when first reference to arbitration was made. Though the claim was crystalised, it was not decided by the earlier Board of Arbitrators because according to them, as the work was incomplete the claim was premature and therefore, the same claim was submitted by the contractor before the new Board of Arbitrators and therefore, neither the procedure under clause 56 was required to be followed nor did it apply because it was the same claim which was being resubmitted. According to the learned counsel thus, the finding recorded by the Arbitrators is in accordance

with the contract between the parties and the same cannot be said to be arbitrary.

3. If in the light of these rival submissions the record of the case is perused, it is clear that it is an admitted position that a claim for rubble, which the contractor was required to bring from other quarries because it was not made available on site in sufficient quantity and could not be supplied by the petitioner as per the contract, was submitted before the first Board of Arbitrators. Perusal of the award shows that when reference was made to the first Board of Arbitrators, the respondents had claimed an amount of Rs.95,18,165/-for quantities supplied upto June 1987. Because the work was still in progress, the Board of Arbitrators did not rule on that claim and held that the claim is premature. Thereafter, the work was completed in June 1995 and the claimants submitted a fresh claim updating the quantity which was subsequently supplied and this time, the claim for Rs.1,22,76,736/- was made. It is thus clear that though the claim was in relation to the same item viz. rubble, the quantity of rubble was different and the amount claimed was also different. This has been clearly observed by the Board of arbitrators in paragraph 6.3 of their award. It is therefore obvious that the claim of Rs.1,22,76,736/-

would be a fresh claim before the new Board of Arbitrators. Though the contractor followed the procedure as laid down by clause 56, amount was not paid to him as per his claim. He therefore filed appeal before the Executive Engineer and after the Executive Engineer rejected his appeal by letter dated 28th March 1995 he filed appeal dated 5th April 1995 before the Superintending Engineer. Paragraph 5 of that appeal is relevant which reads as under :-

> "5. Under his letter dated 28.3.95 the Executive Engineer has informed us that decision given by him in his letter dated 28.2.95 is final and has refused to consider our say finally.
>
> Being aggrieved by the decision of the Executive Engineer and being convinced that the decision of the Executive Engineer is ultra vires the provisions of contract, against the facts emerging from the chronological developments and totally unjust, we now appeal to you in terms of clause 56 of the contract to give us justice, accept our claim and issue necessary instructions to the Executive Engineers... "

. It is thus clear that the contractor clearly understood the situation. Therefore, he referred to the provisions of clause 56. The learned counsel appearing for claimants submitted before me that this appeal was filed to seek action. I do not find such a statement made in the appeal. The Superintending Engineer gave his decision on the appeal on 30th September 1995 and rejected the appeal. Clause 56 therefore definitely came into play. Clause 56 reads as under :-

> "56. Settlement of Disputes - If the contractor considers any work demanded of him to be outside the requirements of the contract or considers any drawings, record or ruling of the Executive Engineer, Warna Dam Division, Warnavati on any matter in connection with or arising out of the contract or the carrying out of work to be unacceptable, he should promptly ask the Executive Engineer, Warna Dam Division, Warnavati in writing, for written instructions or decision. Thereupon the Executive Engineer, Warna Dam Division, Warnavati shall give his written instructions or decision within a period of 30 days of such request.

Upon receipt of the written instructions or decision the contractor shall promptly proceed without delay to comply with such instructions or decision.

If the Executive Engineer, Warna Dam Division, Warnavati fails to give his instructions or decision in writing within a period of 30 days of being requested or if the contractor is dissatisfied with the instructions or decision of the Executive Engineer, Warna Dam Division, Warnavati, the contractor may within 30 days after receiving the instructions or decision appeal upward to Superintending Engineer, Warna Project Circle, Kolhapur, who shall afford an opportunity to the contractor to be heard and to offer evidence in support of his appeal. This official shall give a decision within a period of 30 days after the contractor has given the said evidence in support of his appeal.

If the contractor is dissatisfied with this decision, the contractor within a period of thirty days from receipt of the decision shall

indicate his intention to refer the dispute to Arbitration, failing which the said decision shall be final and conclusive."

. Clause 57 in terms sets out that if the notice to the Arbitrator is not given the decision given in appeal becomes final. The opening portion of clause 57 reads thus :-

"All disputes or differences in respect of which the decision is not final and conclusive, shall on the initiative of either party be referred to the adjudication of three arbitrators."

. It is thus obvious that the decisions on disputes which have been declared as final and conclusive by the terms of the contract are not arbitrable. Therefore, as the decision of the Superintending Engineer dated 30th September 1995 in the absence of notice of intention to refer the dispute to arbitration not being given by the contractor within 30 days, becomes final and conclusive and therefore claim No.6 was not arbitrable. The award of the Arbitrators on claim No.6 is beyond the jurisdiction of the Arbitrators, the award passed therefore is required to

be set aside. The award impugned in this petition in relation to claim No.6 is therefore set aside. Petition is disposed off with costs.

. Parties to act on the copy of this order duly authenticated by the Associate / Personal Secretary as true copy.

. Certified copy expedited.